THE RIGHT TO FOLLOW MONEY WRONGFULLY MINGLED WITH OTHER MONEY.

IF money to which one person is legally or equitably entitled is wrongfully mingled by another with money of his own, so that the whole forms one indistinguishable mass, it was at one time held that all right to follow it is lost because it can no longer be identified; for, as it was said, "money has no earmark." [1] This is, of course, a good reason why the person wronged cannot insist that any particular coins are his; but it is no reason why he should be denied an interest in the product, no reason why he should be relegated to a merely personal claim against the wrongdoer. This early doctrine is accordingly no longer law.[2]

Where money is thus wrongfully confused, the person wronged has two possible equitable remedies whereby he may proceed against the commingled fund or against any property for which it is exchanged by the wrongdoer. First, he may claim an equitable lien or charge on the whole mass for the amount contributed by him. Second, he may claim that the mass in equity belongs in part to him, his interest being proportional to the amount contributed by him, and may charge the wrongdoer as constructive trustee for

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[1] *Ex parte* Dale & Co., 11 Ch. D. 772 (1879). At one time it was even thought that if a factor sells goods for his principal, the principal is not entitled to the specific proceeds although kept separate, because money has no earmark. See Whitecomb *v.* Jacob, 1 Salk. 160 (1710); Scott *v.* Surman, Willes 400 (1742), in which cases, however, it was held that if the money is kept separate and invested in other property, that property can be reached by the principal. Later the doctrine that money cannot be followed because it has no earmark was limited to cases where the money is mingled with other money in one fund so that it can no longer be distinguished from the other money in the fund. *Ex parte* Dale & Co., *supra.* Lord Mansfield said that the doctrine means merely that where money has been transferred to a *bonâ fide* holder for value, he may keep it. Miller *v.* Race, 1 Burr. 452 (1758), p. 457.

[2] Pennell *v.* Deffell, 4 DeG. M. & G. 372 (1853); Frith *v.* Cartland, 2 H. & M. 417 (1865); Knatchbull *v.* Hallett, 13 Ch. D. 696 (1879); Nat. Bk. *v.* Ins. Co., 104 U. S. 54 (1881). The *dictum* in Randolph *v.* Allen, 73 Fed. 23 (1896), p. 39, that the claimant has no interest in the mingled fund (though perhaps justified by the language, but not by the decision, in Litchfield *v.* Ballou 114 U. S. 190 (1884)), is not law. See *In re* Mulligan, 116 Fed. 715 (1902), p. 717; Primeau *v.* Granfield, 184 Fed. 480 (1911), p. 483.

him to that extent. The former may be called for convenience the lien remedy; the latter, the constructive trust remedy.

The lien remedy seems clearly justifiable. The wrongdoer owes a duty to the claimant to restore to him what was wrongfully taken from him. It is the wrongdoer's own fault that he cannot identify his own contribution. Therefore, to make reparation, he should use, and a court of equity will compel him to use, so far as necessary, the fund which is made up in part of the money of the claimant. In other words, the claimant has an equitable lien on the whole fund. The creditors of the wrongdoer cannot object. Since they are not purchasers for value, they stand no better than their debtor. They have no direct legal or equitable interest in their debtor's property, and take subject to any equitable interest which another may have in the property. The claimant's lien is therefore available against the general creditors of the wrongdoer.[3]

The constructive trust remedy, although not so often resorted to in cases where there has been mingling as in cases where there has been no mingling, seems also justifiable on principle. Where there has been no mingling, it has long been settled law that the claimant's money, or, if it is converted into other property, its product, can be recovered by him in specie and that he is not confined to a lien upon the money or its product.[4] It makes no differ-

[3] Taylor *v.* Plumer, 3 M. & S. 562 (1815); Frith *v.* Cartland, 2 H. & M. 417 (1865); Harris *v.* Truman, 7 Q. B. D. 340 (1881); Gorman *v.* Littlefield, 229 U. S. 19 (1913); Amer. Sugar Refining Co. *v.* Fancher, 145 N. Y. 552 (1895). In Taylor *v.* Plumer, *supra*, Lord Ellenborough said (p. 574): "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." In Amer. Sugar Refining Co. *v.* Fancher, *supra*, it was said (p. 560): "It is claimed that the general creditors of the [wrongdoer] will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent [wrongdoer]. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and [the wrongdoer]."

The same result is reached whether the claimant's right is regarded as a right *in rem* (POMEROY, EQUITY JURISPRUDENCE, 3 ed., sec. 105) or a right *in personam* (MAITLAND, LECTURES ON EQUITY AND THE FORMS OF ACTION, p. 142).

In nearly all of the cases cited below in which the claimant was given a lien, the question arose between him and the general creditors or trustee in bankruptcy of the wrongdoer.

[4] PERRY, TRUSTS, 6 ed., secs. 127, 128; POMEROY, EQUITY JURISPRUDENCE, 3 ed., secs. 1049, 1051. Although undoubtedly the claimant may hold the wrongdoer as constructive trustee when he is a misappropriating trustee or other fiduciary, and although the lien remedy is available even where the wrongdoer is not a fiduciary (Humphreys

ence whether or not the wrongdoer intends to give the claimant an interest in the product.[5] Where the product is more valuable than the money, he will come out more than whole. But, since it is his money that earned the profit, and since he ran the risk of losing his money (although it is true that even if his money had been lost he would still have had a personal claim against the wrongdoer), it seems just to give him the profit. Moreover, it is a wise policy not to allow the wrongdoer to keep the profit of his own wrong, although the profit is not strictly at the expense of the claimant.

The same principle should apply where the claimant's money is mingled with that of the wrongdoer, and is therefore only partly instrumental in earning the profit. The claimant should be entitled to a share of the profit, in so far as his property contributed to earning the profit. It has been said that in such case he should

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v. Butler, 51 Ark. 351 (1888); Harrison *v.* Tierney, 254 Ill. 271 (1912); Edwards *v.* Culberson, 111 N. C. 342 (1892); and see the numerous cases where, as in Brennan *v.* Tillinghast, 201 Fed. 609, 615 (1913), a bank obtains deposits by fraudulently concealing its insolvent condition), it has been held in a few cases that the constructive trust remedy is not available against others than fiduciaries. Campbell *v.* Drake, 4 Ired. Eq. 94 (1845); Hart *v.* Dogge, 27 Neb. 256 (1889); and cases cited by Professor Ames in 19 HARV. L. REV. 513, note 5. The distinction seems arbitrary and the weight of authority is properly the other way. O'Neill *v.* O'Neill, 227 Pa. 334 (1910); and see cases cited in 19 HARV. L. REV. 513, note 6, and in POMEROY, EQUITY JURISPRUDENCE, 3 ed., sec. 1051. The courts holding the minority view seem to have been misled by the term "trust." Perhaps almost as much confusion with regard to equitable rights and remedies has been caused by the use of the term "trust" as has been caused with regard to legal rights and remedies by the term "contract." It is not always seen that a constructive trust is not a right but a remedy. It is, of course, very different from a true trust which is a fiduciary relationship and one created in pursuance of the intent of the parties. If equity creates and specifically enforces an obligation to convey certain definite property and if that obligation is imposed on equitable grounds independent of the intent of the parties, as on grounds of redressing a tort or preventing unjust enrichment, then the property is said to be held in constructive trust. The constructive trust is the result of the right of specific enforcement of the obligation. It is the name given to the remedy, not the right for which the remedy is given. There is as good reason in the case of a non-fiduciary as in the case of a fiduciary for imposing a duty to surrender property acquired by a wrongful act; it should make no difference whether it is acquired by breach of trust or other fiduciary obligation, or by fraud or theft.

[5] In Taylor *v.* Plumer, 3 M. & S. 562 (1815), the defendant unsuccessfully contended that where the money is converted into other property, no trust attaches to that property unless the wrongdoer intended to subject the property to the trust. In several earlier cases the court had laid unnecessary stress on the fact that the wrongdoer did so intend. Waite *v.* Whorwood, 2 Atk. 159 (1741); Deg *v.* Deg, 2 P. Wms. 412 (1727), p. 414; Wilson *v.* Foreman, 2 Dick. 593 (1782) (as explained in Lench *v.* Lench, 10 Ves. 511 (1805), p. 519).

be confined to a lien.[6] But, by the weight of authority, the claimant is given the option of a lien on, or a *pro rata* share of, the product.[7] The creditors of the wrongdoer should no more be allowed to object to the constructive trust, than to the lien. They should not stand in a better position than their debtor; they should not be allowed to profit by his wrongful act. They are not purchasers for value, and they take subject to the claimant's equitable interest in the property.[8]

If, after the funds have been mingled, nothing further is done, and the value of the mass remains constant, the result will be the same no matter which remedy is pursued. The claimant will come out exactly whole, no more and no less. Thus, if A wrongfully takes $1000 belonging to B, and mingles it with $1000 of his own, B is entitled to $1000 from the fund, whether he claim one half of the fund, or a lien on the fund for $1000.

So, too, if the wrongdoer merely adds further contributions of his own, the result will be the same, and B will get full satisfaction on either theory. Thus, if in the example suggested above, A adds $2000 more of his own, B is entitled to $1000, whether he claim the proportion of the fund contributed by him, namely one fourth of $4000; or whether he claim a lien on the $4000 for $1000.

If, however, the whole fund is exchanged for property which is or becomes greater in value than the fund, the claimant comes out better by proceeding on the constructive trust theory; if it is or becomes less valuable than the fund, he finds the lien theory more

[6] See the *dictum* of Jessel, M. R., in Knatchbull *v.* Hallett, 13 Ch. D. 696 (1879), p. 709. But see an explanation of this *dictum* in Primeau *v.* Granfield, 184 Fed. 480 (1911), p. 485. In Bresnihan *v.* Sheehan, 125 Mass. 11 (1878), the court gave only a lien, although on principle it would seem that the claimant was entitled to a *pro rata* share.

[7] Wedderburn *v.* Wedderburn, 4 Myl. & C. 41 (1838); Primeau *v.* Granfield, 184 Fed. 480 (1911) (reversed on another ground in s. c., 193 Fed. 911 (1911)); Treacy *v.* Power, 112 Minn. 226 (1910); Shearer *v.* Barnes, 118 Minn. 179 (1912); Fant *v.* Dunbar, 71 Miss. 576 (1893); and cases cited in 19 HARV. L. REV. 512, note 2. *In re* Oatway, [1903] 2 Ch. 356, and some of the other cases there cited, are, however, illustrations of a lien rather than of a constructive trust.

So, too, if the wrongdoer commingles the money of two persons without contributing any money of his own, and the fund is profitably invested, the persons wronged share the product *pro rata*. See Lord Provost *v.* Lord Advocate, 4 App. Cas. 823 (1879).

[8] Byrne *v.* McGrath, 130 Cal. 316 (1900); Kepler *v.* Davis, 80 Pa. 153 (1875). The doubt expressed in Smith *v.* Township of Au Gres, 150 Fed. 257 (1906), p. 261, and in Greene *v.* Haskell, 5 R. I. 447 (1858), p. 457, does not seem to be well founded.

advantageous. Thus, if A wrongfully mingles $1000 of his own with $1000 of B's, and with the product buys land which is worth $3000, it is more advantageous to claim half of the land, than a lien on it for $1000. If the land is worth $1000, it is more advantageous to claim a lien on it for $1000, than half of the land.

Now, let it be supposed that after he has wrongfully mingled his money with that of the claimant, a part of the fund is withdrawn by the wrongdoer and dissipated. Here the claimant has a lien on, or a *pro rata* share of, what is left.[9] The reason generally given in the cases, is that suggested in the case of Knatchbull *v.* Hallett,[10] namely, that it should be presumed that the wrongdoer intends to draw out his own money, because to draw out the claimant's money would be dishonest. This is, of course, a pure fiction,[11] and as usually happens when a proper result is reached by fictitious reasoning, has led to erroneous results in other cases.[12] It seems to be thought necessary to show in what part of the commingled fund the claimant's money is to be found; and as it is impossible actually to distinguish the claimant's contribution, the courts have resorted to a presumption as to the intent of the wrongdoer, although there is no reason to suppose that he had any particular intent, and no reason for allowing his intent to affect the claimant's rights. The claimant ought, it is true, to have an interest in what is left, not because of any intent of the wrongdoer, but because the wrongdoer, whatever his intent, should not be allowed by taking away a part of the fund, to deprive the claimant of his lien on, or share of, the rest of the fund.

Where, instead of physically mingling the money, the wrongdoer deposits in a bank in the same account, his own and the claimant's money, it was held in the case of Pennel *v.* Deffell[13] that the rule

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[9] See cases cited in notes 16 and 18, *infra.*

[10] 13 Ch. D. 696 (1879), p. 726.

[11] See Primeau *v.* Granfield, 184 Fed. 480 (1911), p. 484; *In re* A. O. Brown & Co., 189 Fed. 432 (1911), p. 434.

[12] See the discussion, *infra*, of *In re* Oatway, [1903] 2 Ch. 356, and the other cases where the part withdrawn is preserved and the remainder dissipated.

[13] 4 DeG. M. & G. 372 (1853). The decision in this case on this point was followed in Brown *v.* Adams, L. R. 4 Ch. 764 (1869). In Pennell *v.* Deffell it was conceded that in case of physical mingling, Clayton's case has no applicability and that the withdrawal of part would not destroy the claimant's lien on the remainder. 4 DeG. M. & G. 372 (1853), p. 382.

in Clayton's Case[14] applies. By this rule, the first withdrawals from an account in a bank are charged against the first deposits. As between the depositor and the bank, this rule is fair enough; for it is a question of intent as to what part of the account is paid when the depositor makes a withdrawal, and since it is necessary to have some definite rule, in the absence of any evidence of actual intent, this rule is adopted because it comes as near as any to expressing the probable intent. In cases of a wrongful mingling of deposits, however, the rule is wholly inapplicable in determining the relation between the wrongdoer and the claimant. By depositing the whole in one account, the wrongdoer has confused his money and that of the claimant, as inextricably as though he had physically mingled the money. He has, by the use of the two funds, acquired a single chose in action. That whole chose in action, therefore, is subject to a lien of the claimant, or, on the constructive trust theory, is partially owned by him. The wrongdoer, whatever his intent, cannot shake off the interest of the claimant. Pennell *v.* Deffell has accordingly been overruled on this point, and it is now held that the claimant has an interest in the balance, regardless of the order of deposit.[15]

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[14] 1 Mer. 572 (1816).

[15] Knatchbull *v.* Hallett, 13 Ch. D. 696 (1879), p. 726, a case which has met with universal approval in this country. In the case of *In re* A. O. Brown & Co., 189 Fed. 432 (1911), in speaking of the rights of a claimant whose money has been wrongfully mingled by another with money of his own in a bank in one account from which the wrongdoer has withdrawn and dissipated a part, the court said (p. 434): "All the deposits taken together constitute an obligation of the banker's, a single chose in action, amounting in total to the sum of the deposits. Upon that chose in action the beneficiary has a lien, if he wishes to assert it, equal to the sum of money which his property has contributed to it. So in this case the claimants may elect to retain a lien upon the total deposit after the first withdrawal. This is the effect of the case of Knatchbull *v.* Hallett, L. R. 13 Ch. Div. 696, a case which has been very frequently cited and the decision of which has been followed many times. This is sometimes stated as a presumption of the trustee's intent, but that is a fiction."

If the wrongdoer commingles the money of two persons without contributing any money of his own, and subsequently makes withdrawals, it has been held that the rule in Clayton's Case applies. Knatchbull *v.* Hallett, 13 Ch. D. 696 (1879); Hancock *v.* Smith, 41 Ch. D. 456 (1889) (*semble*); *In re* Stenning, [1895] 2 Ch. 433; Mutton *v.* Peat, [1899] 2 Ch. 556, p. 560 (*semble*); Empire State Surety Co. *v.* Carroll County, 194 Fed. 593 (1912), p. 605; Hewitt *v.* Hayes, 205 Mass. 356 (1910), p. 365. But *cf.* *In re* Mulligan, 116 Fed. 715 (1902), p. 719. This seems erroneous on principle. It would seem that on the constructive trust theory the persons wronged should be treated as co-owners in proportion to the amounts contributed by them, and the loss

Whether, therefore, the money of the wrongdoer and the claimant is physically mingled, or is deposited in a single account, as long as there is always a balance on hand, at least as large as the amount of the claimant's contribution, he will, by pursuing the lien remedy, come out whole. Thus, if A wrongfully mingles $1000 of his own and $1000 of B's, and then withdraws $1000 which he dissipates, B on the lien theory, has a charge on what is left for the amount contributed by him, that is, he is able to get his $1000 in full; [16] on the constructive trust theory he gets one half of what is left, or $500.[17] If, however, the fund is diminished below the amount of the claimant's contribution, he will lose *pro tanto;* [18] and, if the fund is exhausted, his interest is lost.[19]

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resulting from any withdrawals, like the gain from a rise in value (Lord Provost *v.* Lord Advocate, 4 App. Cas. 823 (1879)), should be shared by them *pro rata.* On the lien theory it would seem that the same result should follow. Compare the rules that are applied at law with respect to confusion of grain or other fungible property.

[16] Knatchbull *v.* Hallett, 13 Ch. D. 696 (1879), p. 731; Massey *v.* Fisher, 62 Fed. 958 (1894); Hutchinson *v.* LeRoy, 113 Fed. 202 (1902); *In re* Royea's Estate, 143 Fed. 182 (1906); Smith *v.* Mottley, 150 Fed. 266 (1906); Butler *v.* Western German Bank, 159 Fed. 116 (1908); *In re* Stewart, 178 Fed. 463 (1910); Elizalde *v.* Elizalde, 137 Cal. 634 (1902); Whitcomb *v.* Carpenter, 134 Ia. 227 (1907); Fogg *v.* Tyler, 109 Me. 109 (1913); Commissioners *v.* Wilkinson, 119 Mich. 655 (1899); Patek *v.* Patek, 166 Mich. 446 (1911); Blair *v.* Hill, 50 App. Div. (N. Y.) 33 (1901) (affirmed s. c., 165 N. Y. 672 (1901)); Widman *v.* Kellogg, 22 N. D. 396 (1911); Emigh *v.* Earling, 134 Wis. 565 (1908).

[17] He cannot on the constructive trust theory take a larger share of one part by surrendering his claim on the rest. He is a co-owner of the whole and of every part of the whole, and a mere separation of the whole into parts and a change in the form of any of those parts or a loss of any of the parts, as by a sale of it to a purchaser without notice, will not change the nature or extent of his interest in the rest. Watson *v.* Thompson, 12 R. I. 466 (1879), p. 471. In this case the court said: "The complainant seems to suppose that, having lost his resulting interest in what was sold, he can have the loss made good to him by a proportional increase of interest in what is left. But this surely cannot be so. His interest was inherent in every part. As soon as any part was sold his interest in that part was converted into an interest in the price received for it. It remained a resulting trust or equity in the price, or in the property in which the price was invested, so long as it could be traced specifically; and when it ceased to be specifically traceable, it became simply a personal debt or demand to be recovered of [the wrongdoer], or out of his estate like any other personal debt or demand."

[18] Bank of British N. A. *v.* Freights, 127 Fed. 859 (1904) (affirmed s. c., 137 Fed. 534 (1905)); Woodhouse *v.* Crandall, 197 Ill. 104 (1902); Waddell *v.* Waddell, 36 Utah 435 (1909); State *v.* Foster, 5 Wyo. 199 (1894).

[19] Beard *v.* Independent District, 88 Fed. 375 (1898); *In re* Brown, 193 Fed. 24 (1912) (affirmed *sub nom.* First Nat. Bank *v.* Littlefield, 226 U. S. 110 (1912)); *In re* M. E. Dunn & Co., 193 Fed. 212 (1912); *Re* Assignment of Bank of Oregon, 32 Ore. 84 (1897).

Now, it so happened, that in the earlier cases the part first withdrawn from the commingled fund was invariably dissipated, and the claimant wished to establish an interest in the remainder, which interest he was allowed, as has been stated, on the ground that it is presumed that the wrongdoer withdraws his own money first. But when the part first withdrawn is invested or otherwise preserved, and the remainder is dissipated, the application of that presumption would throw a loss on the claimant. In the case of *In re* Oatway,[20] the wrongdoer made an investment of part of the fund, leaving an amount greater than the contribution of the claimant, which amount he later dissipated. The court refused to apply the presumption, and held that the claimant had a charge on the property in which the money withdrawn was invested. If the part drawn out had been treated as belonging to the wrongdoer, the claimant would have had no interest in the product of that part. This decision seems obviously right, and although the authorities are not unanimous,[21] a similar result has been reached in several cases in this country.[22] The separation of the fund into

[20] [1903] 2 Ch. 356.

[21] In the following cases the claimant was not allowed to reach the proceeds of withdrawals when the withdrawals did not diminish the fund below the amount of the claimant's contribution, because of the fictitious presumption that the part drawn out belonged to the wrongdoer: Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); *In re* City Bank of Dowagiac, 186 Fed. 413 (1910); *In re* Brown, 193 Fed. 24 (1912); (affirmed, without mention of this point, *sub nom.* First Nat. Bank *v.* Littlefield, 226 U. S. 110 (1912)); Empire State Surety Co. *v.* Carroll County, 194 Fed. 593 (1912); Covey *v.* Cannon, 104 Ark. 550 (1912); Standish *v.* Babcock, 52 N. J. Eq. 628 (1894); Waddell *v.*Waddell, 36 Utah 435 (1909).

In these cases it is conceded that so far as the withdrawals diminish the fund below the amount of the claimant's contribution, the claimant may follow them. But even this seems to be denied in Bright *v.* King, 20 Ky. Law Rep. 186 (1898).

In Covey *v.* Cannon, *supra*, a part of the money drawn out was redeposited, and yet it was held that the claimant was not entitled to it.

[22] Brennan *v.* Tillinghast, 201 Fed. 609 (1913); City of Lincoln *v.* Morrison, 64 Neb. 822 (1902), p. 831; Lamb *v.* Rooney, 72 Neb. 322 (1904). And see Primeau *v.* Granfield, 184 Fed. 480 (1911); *In re* A. O. Brown & Co., 189 Fed. 432 (1911). In Primeau *v.* Granfield, *supra*, the court said (p. 484):

"The language about presumed intent in Knatchbull *v.* Hallett, *supra*, which Sir George Jessel laid down with his customary vigor, was merely a way of giving an explanation by a fiction of the right of the beneficiary to elect to regard his right as a lien. That it is a fiction appears clearly enough in this case where Granfield [the wrongdoer] could have had no intention about the investments as he meant to use all the money for himself anyway. To say that in such a case he will be 'presumed' to intend to take his own money out first is merely a disingenuous way common enough,

two parts, and the separate disposition of those parts, does not deprive the claimant of his equitable interest, which, since it extended to the whole, will extend to both parts or the product of both parts. This is sometimes also expressed in the form of a presumption, namely, that all sums drawn out and dissipated are presumed to be those of the wrongdoer.[23] This is simply another way of saying, that although part of the fund is dissipated, the lien still remains on, or the constructive trust still attaches to, any other parts, or the product of any other parts which can still be traced. Hence, if A mingles $1000 of his own and $1000 of B's, and draws out $1000 and invests it in land, and then dissipates the balance, B may claim a lien on the land for $1000; or, on the constructive trust theory, one-half of the land.

If, after the wrongdoer has dissipated part of the fund, he makes new contributions out of his own funds, the additions thus made, unless they are considered a restoration of the claimant's money,[24] will not increase the amount the claimant is entitled to get out of the fund. On the constructive trust theory he will simply get a smaller fraction of a larger total sum. On the lien theory he is entitled to a charge upon the enlarged fund, but only for the amount of the balance of the original commingled fund. Thus, if A wrongfully mingles $1000 of his own with $1000 of B's, and draws out and dissipates $1500, and then to the remaining $500 adds $1000 of his own, on the constructive trust theory B, who was entitled to one half of the $500, is now entitled to one sixth of the

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to avoid laying down a rule upon the matter. This fiction in *Re* Oatway [1903] 2 Ch. Div. 356, would have brought the usual injustice which fictions do bring, when pressed logically to their conclusion. Logically, the trustee's widow, in that case, was quite right in claiming the first withdrawal, although the trustee had invested it profitably, and had subsequently wasted all of the fund which had remained in the bank. That was, of course, too much for the sense of justice of the court which awarded to the wronged beneficiary the investment, intimating that the rule in Knatchbull *v.* Hallett, *supra*, applied only where the withdrawals were actually spent and disappeared. If to that rule be added the qualification that if the first withdrawals be invested in losing ventures, then the beneficiary is to have a lien, if he likes, till he uses up that whole investment, and then may elect to fall back for the balance upon the original mixed account from which the withdrawal was made, there is no objection, but it is a very clumsy way of saying that he may elect to accept the investment if he likes, or to reject it."

[23] City of Lincoln *v.* Morrison, 64 Neb. 822 (1902), p. 830.

[24] The question under what circumstances such an addition is to be treated as a restoration of the claimant's money is considered below.

ultimate $1500. On the lien theory he is entitled to a charge on the $1500 for $500. He cannot get more than that, for he has not contributed more than that to the ultimate $1500 fund. Although he contributed $1000 to the original fund, yet that fund was diminished to $500; he had no interest in the other contribution to the ultimate $1500. The claimant, in such case, can get no more than the lowest balance existing at any time between the time of deposit and the time of distribution.[25]

But suppose that the lowest balance is invested and earns a profit. In that event the claimant should be allowed a lien not only for the amount of that balance, but also for the profit earned by it, up to the amount originally contributed by him. Thus, if A has wrongfully mingled $1000 of his own with $1000 of B's, and has drawn out and dissipated $1500, and has invested the remaining $500 in stock which he sells for $1500, B should be entitled to a lien on the $1500 for $1000.[26] The increase in value here comes from the fund in which the claimant had an interest, and is not a contribution added by the wrongdoer from his own funds. On the constructive trust theory, he is entitled to one-half the proceeds of the stock, or $750.

If after the fund is reduced by withdrawals, and after an addition is made by the wrongdoer from his own funds, the total amount is then invested, it is submitted that, if the foregoing reasoning is

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[25] Mercantile Trust Co. *v.* St. Louis Ry. Co., 99 Fed. 485 (1900); *In re* Mulligan, 116 Fed. 715 (1902), p. 717 (*semble*); Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); American Can Co. *v.* Williams, 178 Fed. 420 (1910); *In re* Brown, 193 Fed. 24 (1912) (affirmed *sub nom.* First Nat. Bank *v.* Littlefield, 226 U. S. 110 (1912)); *In re* M. E. Dunn & Co., 193 Fed. 212 (1912); Powell *v.* Missouri Co., 99 Ark. 553 (1911); Covey *v.* Cannon, 104 Ark. 550 (1912); Hewitt *v.* Hayes, 205 Mass. 356 (1910).

If the whole commingled fund is withdrawn before the additions are made, the claimant's interest is lost. *In re* Brown, *supra*; *In re* M. E. Dunn & Co., *supra*; Hewitt *v.* Hayes, *supra*. Of course, if to the lowest balance of the commingled fund additions of the claimant's money are made, he may take a sum equal to those additions plus the lowest balance. Board of Commissioners *v.* Patterson, 149 Fed. 229 (1906). See Hewitt *v.* Hayes, *supra*.

[26] See *In re* Oatway, [1903] 2 Ch. 356; City of Lincoln *v.* Morrison, 64 Neb. 822 (1902).

In Waddell *v.* Waddell, 36 Utah 435 (1909), after the commingled fund had been reduced below the amount of the claimant's contribution, various articles were bought. The court gave the claimant a lien on each article but only for the purchase price of that article. This seems wrong; if there was any profit it should go to the claimant. He should have a lien on all the articles for the amount of his original contribution.

correct, the claimant should have a lien on the investment for a sum equal to the lowest amount to which the fund was reduced, plus that part of the profit which can fairly be said to be the product of that amount. In other words, he should have a lien for the proportion that the lowest balance bears to the new fund composed of that balance and the additions made by the wrongdoer. Thus, if A mingles $1000 of his own with $1000 of B's, and then dissipates $1500, and later adds $500 of his own and invests the $1000 in stock which he sells for $1500, B should have a lien on the $1500 for $750, that is for the $500 in which he had an interest, and on the profit fairly attributable to that $500, namely one half of the whole profit, or $250.[27] Of course, no matter how large the profit arising from the investment in the stock, the claimant cannot, on the lien theory, get more than $1000, the amount originally contributed by him. On the constructive trust theory he is entitled to one fourth of the proceeds of the stock, for he has contributed one fourth of the money with which it was purchased.

The new additions made by the wrongdoer out of his own funds may sometimes, however, be regarded as a restoration of the money of the claimant. If the wrongdoer is insolvent, and such appro-

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[27] It is perhaps arguable that the claimant should be allowed a lien for the amount of the lowest balance plus the whole profit. But if, to put an extreme case, after the wrongdoer has mingled $1000 of his own with $1000 of the claimant's and has dissipated all but $1, and that $1 is mingled with $1000 of the wrongdoer's own money, and the $1001 is invested in stock which doubles in value, it seems absurd to give the claimant a lien for $1000. If the $1 had not been a part of the purchase price of the stock, the claimant would have had no interest in the stock. The use of the $1 should not entitle him to almost half the value of the stock. It might be said that the balance of the fund in which the claimant had an interest must substantially contribute to the earning of the profit. But such a rule would be too indefinite for application. To give him a lien to the extent of the balance of the fund into which his money went plus the part of the profit attributable to that balance seems both fair and easy of application. In the case suggested above he should be given a lien on the stock for $2.

In City of Lincoln *v.* Morrison, 64 Neb. 822 (1902), a part of the commingled fund was used in buying certain state warrants, a large part of the purchase price being borrowed on the security of the warrants. The warrants were sold at a profit. It was held that the whole amount of the proceeds, which was less than the amount originally contributed by the claimant, could be reached by him. This does not seem opposed to what has been said in the preceding paragraph; for the profit really was earned wholly with the part of the commingled fund. It is like a case of a purchase of stock on a margin. As to how far profits arising from transactions partly for cash and partly on credit may be the product of the credit and not of the cash, see Kyle *v.* Barnett, 17 Ala. 306 (1850).

priation is a preference, it can give the claimant no right to take a larger sum from the fund than he could have taken before the appropriation.[28] If the wrongdoer actually intends to make an appropriation to the claimant's use, and if such an appropriation is not a preference, then the claimant's rights are the same as though the amount so restored had never been withdrawn.[29] The intent to restore may be shown, not merely by direct evidence, but by circumstances. Thus, where the wrongdoer deposits in an account the money of several claimants, and none of his own, and draws out a part and then makes a deposit in that account from his own funds, an intent to make restoration may fairly be inferred, and if the restoration when made is not a fraudulent preference, the claimants cannot be prevented from taking the money so deposited.[30] But suppose no intent to restore is shown either directly or by inference. Should the law impose a charge on the fund for more than the balance, or the product of the balance, of the fund into which the claimant's money went? It would seem not. The wrongdoer owes a duty to the claimant to make reparation. But after the whole of the commingled fund has been dissipated, the duty is a merely personal one and does not attach to any particular assets, for it is settled by the great weight of authority that the claimant has no charge on the general assets of the wrongdoer.[31]

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[28] Clark *v.* Rogers, 183 Fed. 518 (1910); Hewitt *v.* Hayes, 205 Mass. 356 (1910).

As to how far it is a preference for a trustee on the eve of bankruptcy to make good the trust money, see *Ex parte* Stubbins, 17 Ch. D. 58 (1881); *Ex parte* Taylor, 18 Q. B. D. 295 (1886); Sharp *v.* Jackson, [1899] A. C. 419 (affirming New *v.* Hunting, [1897] 2 Q. B. 19); and, for the rule under the U. S. Bankruptcy Act, Clark *v.* Rogers, *supra.*

[29] *Ex parte* Kingston, L. R. 6 Ch. App. 632 (1871); State Savings Bank *v.* Thompson, 128 Pac. 1120 (Kan. 1913); Supreme Lodge *v.* Liberty Trust Co., 102 N. E. 96 (Mass. 1913); Jeffray v. Towar, 63 N. J. Eq. 530 (1902), p. 546; Van Alen *v.* American Bank, 52 N. Y. 1 (1873); Baker *v.* N. Y. Bank, 100 N. Y. 31 (1885); United National Bank *v.* Weatherby, 70 App. Div. (N. Y.) 279 (1902). Compare Sharp *v.* Jackson, [1899] A. C. 419 (affirming New *v.* Hunting, [1897] 2 Q. B. 19); Taylor *v.* London and County Banking Co., [1901] 2 Ch. 231, p. 254. See *In re* Northrup, 152 Fed. 763 (1907).

If the wrongdoer mingles the funds of several persons with his own and withdraws more than his own and makes new deposits, and if the new deposits are intended as a restoration, the claimants will all share *pro rata. In re* T. A. McIntyre & Co., 181 Fed. 960 (1910).

[30] United National Bank *v.* Weatherby, 70 App. Div. (N. Y.) 279 (1902).

[31] Spokane County *v.* First Nat. Bank, 68 Fed. 979 (1895); Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); Empire State Surety Co. *v.* Carroll County, 194 Fed. 593 (1912); *In re* Larkin, 202 Fed. 572 (1912); Lowe *v.* Jones, 192 Mass. 94

If the fund was commingled in a bank in one account in the name of the wrongdoer, and then was wholly withdrawn, there is no reason why the claimant should be able to get subsequent deposits unless the wrongdoer intended to make restoration; and, if there was still left a part of the commingled fund, there seems to be no reason why he should get more than the balance. It is held, therefore, that the mere deposit of new additions of the wrongdoer's own funds does not increase the claimant's rights.[32] It is still more clear that in cases of physical mingling, subsequent additions by the wrongdoer after a partial dissipation of the commingled fund, will not increase the amount to which the claimant is entitled.[33] If, however, the claimant's money was deposited in a special trust account, and the wrongdoer withdraws a part and then deposits his own funds, it may well be held that regardless of his intent, the new deposit shall be treated as a restoration. Here the wrongdoer has put the money where it ought to be. He may be said to have performed to that extent his duty of reparation, whether he intended to make reparation or not.[34]

(1906); Jaffe *v.* Weld, 155 App. Div. (N. Y.) 110 (1913); and see cases cited in 19 HARV. L. REV. 522, note 2.

[32] Mercantile Trust Co. *v.* St. Louis Ry. Co., 99 Fed. 485 (1900); Bank of British N. A. *v.* Freights, 137 Fed. 534 (1905), p. 538 (*semble*); Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); American Can Co. *v.* Williams, 178 Fed. 420 (1910); *In re* Brown, 193 Fed. 24 (1912) (affirmed *sub. nom.* First Nat. Bank *v.* Littlefield, 226 U. S. 110 (1912)); *In re* M. E. Dunn & Co., 193 Fed. 212 (1912); Powell *v.* Missouri Co., 99 Ark. 553 (1911); Hewitt *v.* Hayes, 205 Mass. 356 (1910); Cole *v.* Cole, 54 App. Div. (N. Y.) 37 (1900).

[33] *In re* Mulligan, 116 Fed. 715 (1902), p. 717 (*semble*); Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); Covey *v.* Cannon, 104 Ark. 550 (1912).

[34] A somewhat similar question has arisen when one who holds stock for another wrongfully disposes of it and later acquires similar stock. If the wrongdoer owed the duty to hold the particular shares, then unless the proceeds of those shares can be traced into the new shares, or unless it is shown that the wrongdoer intended to make a restoration (Perkins *v.* Perkins, 134 Mass. 441 (1883)), the claimant has no better right than the general creditors. Frith *v.* Cartland, 2 H. & M. 417 (1865), p. 422 (*semble*). But where the wrongdoer is a broker and has the right to dispose of the stock provided he keeps similar stock on hand and he does dispose of it without keeping similar stock on hand, it is held that the person wronged may reach similar stock subsequently acquired. By acquiring the new stock he has to that extent made reparation. Gorman *v.* Littlefield, 229 U. S. 19 (1913) (reversing *In re* Brown, 184 Fed. 454 (1911)); *In re* A. O. Brown & Co., 171 Fed. 254 (1909). See *contra, In re* T. A. McIntyre, 181 Fed. 960 (1910); *In re* A. O. Brown & Co., 183 Fed. 861 (1910); *In re* Brown, *supra*; *In re* Ennis, 187 Fed. 728 (1911). It is not altogether clear in Gorman *v.* Littlefield, *supra*, whether the court goes on the ground of a presumption that the wrongdoer intended

To sum up: If one person wrongfully mingles the money of another with his own, the person wronged has a right either to (1) an equitable lien on, or (2) a share of, the whole commingled fund or any traceable product of it.

(1) The equitable lien rests on the whole fund or its product, for the amount the claimant has contributed to it; the mere separation of the fund into parts by withdrawals which are preserved will not affect his interest; withdrawals which are dissipated will diminish his security, but, so long as the balance left does not fall below the amount contributed by him, will not diminish the amount he is entitled to take; if the balance falls below the amount of his contribution, and nothing more is added from other sources, he has a lien on the balance, or, if it is invested, on its product, for the amount of his contribution; additions made from other funds, unless treated as a restoration of the claimant's money, will increase the fund on which he has a lien, but not the amount he is entitled to take, which will be the lowest balance of the original commingled fund, or, if that balance and the subsequent additions are advantageously invested, the balance and the profit earned by it, up to the amount originally contributed by him.

(2) The extent of his share will depend on the proportion contributed by him; it will not be affected by the mere separation of the fund into parts by withdrawals which are preserved; any rise in value not resulting from new contributions will enure to his benefit, for the denominator of the fraction representing his interest will remain the same while the numerator will increase; any loss by withdrawals which are dissipated, or by a decline in value, will cause him a loss, for the denominator of the fraction will remain the same while the numerator will decrease; any new contributions of other funds, unless treated as a restoration of the claimant's money, will simply give him a smaller part of a larger whole.

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to restore, or on the ground that, since it was the wrongdoer's duty to restore, the person wronged has a claim to the newly acquired stock regardless of the wrongdoer's intent.